RECORD
AND
BRIEF

No. 16-784

Supreme Court, U.S.
FILED
JUL 20 2017
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MERIT MANAGEMENT GROUP, LP,
Petitioner,

v.

FTI CONSULTING, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR VARIOUS FORMER TRIBUNE AND LYONDELL SHAREHOLDERS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are various former shareholders of the Tribune Company ("Tribune") and Lyondell Chemical Company ("Lyondell") whose shares were repurchased in multi-billion dollar public-market securities transactions. Amici are currently defendants in constructive fraudulent-transfer actions where the creditor-plaintiffs seek to avoid and recover the settlement payments for amici's shares.

[1] No party's counsel authored this brief in whole or part, and no party or their counsel contributed monetarily to its preparation or submission. The parties' letters consenting to the filing of amicus briefs are on file with the Clerk of the Court.

Amici moved to dismiss the cases against them, arguing that the constructive fraudulent-transfer claims were barred by Bankruptcy Code §546(e), which provides a safe harbor against avoidance of securities-settlement payments "made by or to (or for the benefit of)" specified categories of participants in the securities markets, including clearing agencies, stockbrokers, and financial institutions (collectively, "Qualifying Entities"). The repurchase of amici's securities occurred through a complex public securities clearance and settlement system and required transfers by and to numerous Qualifying Entities acting as intermediaries.

The Second Circuit held that §546(e) barred the constructive fraudulent-transfer claims to avoid the Tribune settlement payments. *In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98 (2d Cir. 2016). Thereafter, the bankruptcy court recommended dismissal of the similar claims to avoid the Lyondell settlement payments. *Weisfelner* v. *Fund 1*, No. 10-4609 (Bankr. S.D.N.Y. July 20, 2016) (ECF 2414); *Weisfelner* v. *Reichman*, No. 12-1570 (Bankr. S.D.N.Y. July 20, 2016) (ECF 118). But the *Tribune* plaintiffs filed a petition for certiorari (still pending), arguing that §546(e) does not apply if the Qualifying Entity acted only as an intermediary, without a beneficial interest in the settlement payments. No. 16-317 (Sept. 9, 2016). And the district court has held in abeyance the bankruptcy court's recommendation in *Lyondell*, evidently awaiting this Court's disposition of this case. Additionally, in another action, the Tribune litigation trustee recently sought leave to assert its own constructive fraudulent-conveyance claim against the Tribune defendants should this Court affirm in this case. The outcome here could thus materially affect amici.

SUMMARY OF ARGUMENT

Unless the bankruptcy trustee shows that the debtor actually intended to hinder, delay or defraud creditors under Bankruptcy Code §548(a)(1)(A), §546(e) bars the trustee from bringing a fraudulent-transfer claim to "avoid" (unwind) securities-settlement payments "made by or to (or for the benefit of)" a Qualifying Entity, all of which exclusively or typically act as intermediaries between securities issuers and investors. Section §546(e)'s safe harbor expressly applies whenever a settlement payment is made "by" or "to" a Qualifying Entity, even if it had no beneficial interest in the securities or the settlement payment.

The Seventh Circuit's view that the safe harbor applies only where the Qualifying Entity had a beneficial interest in the transferred property cannot be squared with the Bankruptcy Code's text and structure. That interpretation converts the phrase "for the benefit of" into a universal requirement, rather than one of three alternative bases for triggering the safe harbor, which makes "by or to" superfluous. It also fails to recognize that most Qualifying Entities serve exclusively or predominantly as intermediaries; it would have made no sense for Congress to tie the safe harbor to such entities' involvement if the safe harbor applied only if the entities were the ultimate owners of the property. Further, if the court below were right that Congress sought only to protect Qualifying Entities' own balance sheets, it would not (among other things) have extended the safe harbor to transfers "by" such entities.

By providing a safe harbor for all securities transfers settled using Qualifying Entities, Congress ensured the finality of settled securities transactions and

promoted market stability. Congress recognized that allowing plaintiffs to unwind settled securities transactions years later with easily alleged constructive fraudulent-conveyance claims would destabilize the market by exposing investors and intermediaries to increased risk and thereby discourage investment and capital formation. Nothing in the statutory text or congressional purpose supports the court of appeals' added limitation on the safe harbor, which would create arbitrary distinctions among similarly situated investors.

Recognizing the complex web of transactions among clearing agencies, brokers, and other intermediaries lying at the center of the modern securities settlement system, Congress provided that securities payments settled through Qualifying Entities cannot be avoided based solely on allegations of constructive fraudulent conveyance. Although the court of appeals believed Congress's concerns were not implicated by the *Merit Management* transaction, the court ignored the central role of financial intermediaries in that transaction. In any event, Congress's concerns are undoubtedly implicated in cases like *Tribune* and *Lyondell*, where plaintiffs seek to undo billion-dollar transfers, with payments to thousands of shareholders settled through the complex national clearance and settlement system nearly a decade earlier.

ARGUMENT

I. THE SEVENTH CIRCUIT DISREGARDED THE EFFECT OF ITS NARROW READING OF §546(e) ON LARGE, PUBLIC-COMPANY TRANSACTIONS

The Seventh Circuit relied excessively on the facts of the small, private-market transaction before it, while ignoring the implications for the public securities mar-

kets of applying its interpretation of §546(e) to far larger, more complex securities transactions. The multi-billion dollar repurchases of Tribune and Lyondell shares illustrate why the Seventh Circuit's rule would dramatically destabilize the public securities markets if applied in cases like *Tribune* and *Lyondell*.

A. Tribune was one of the world's largest media companies, and Lyondell was one of the world's largest petrochemical companies. Their stocks traded on national exchanges and were included in the S&P 500 (Tribune) and S&P midcap 400 (Lyondell) indices. Their shares were held by thousands of investors, including mutual funds, pension funds, employees, investment trusts, and individuals. In 2007, substantially all publicly held shares in Tribune and Lyondell were repurchased in transactions that took each of the companies private. Tribune and Lyondell shareholders received approximately $8.2 billion and $12.5 billion, respectively. Tribune and Lyondell filed extensive public disclosures regarding the transactions, which were also followed closely in the press.[2]

Following the 2008 financial crisis, both companies filed for reorganization under Chapter 11 of the Bankruptcy Code. Thereafter, creditor representatives filed actions to avoid and recover as fraudulent-transfers the payments made to amici and thousands of other former Tribune and Lyondell shareholders for their stock.

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[2] *See, e.g.*, Tribune Co., Form 8-K (Apr. 1, 2007); Lyondell Chem. Co., Form 8-K (July 16, 2007); Fifth Am. Compl. ¶¶ 244-57, *In re Tribune Co. Fraudulent Conveyance Litig.*, No. 11-MD-2296 (S.D.N.Y. Aug. 2, 2013) (ECF 2701) (highlighting press reactions); Rocha, *Basell to Buy Lyondell for Almost $13 Billion*, Reuters (July 17, 2007), *at* http://www.reuters.com/article/us-lyondell-basell-idUSN1740049020070717.

Because the companies' shares traded publicly and were widely held, the Tribune and Lyondell transactions were accomplished using the national securities clearance and settlement system at the heart of §546(e)'s protection. Settlement payments to the ultimate owners of Tribune and Lyondell shares had to be transferred "by" and "to" numerous Qualifying Entities.

The Tribune transaction took place in two steps. First, Tribune initiated a public tender offer, depositing $4.24 billion with Computershare Trust Company ("CTC"), a financial institution acting as Tribune's paying agent. Tribune Co., Schedule TO at Ex-99 (a)(1)(A) 73, 81-82 (Form SC TO-I) (Apr. 25, 2007). Second, several months later, Tribune deposited approximately $4 billion more with CTC. In both steps, CTC distributed the proceeds to the record owners of Tribune shares, primarily the Depository Trust Company ("DTC"), the nation's central securities depository. *Tribune*, 818 F.3d at 106. The great bulk of Tribune shares were on deposit at DTC, and DTC distributed the funds to Participants (described below), which, in turn, directly or indirectly transferred the funds to the ultimate owners.

In *Lyondell*, payments to thousands of shareholders were likewise transferred "by" and "to" numerous levels of intermediaries in the public securities market, including those listed in §546(e). Loans provided to Lyondell by financial institutions were transferred to Citibank, another financial institution, which acted as "paying agent." Payments were then made by Citibank to the record holders for the shares. Many record holders, in turn, were themselves intermediaries—stockbrokers or other financial institutions—holding Lyondell stock for their customers, who might be the ultimate owners or intermediaries themselves. As in

Tribune, for the vast majority of shares, DTC acted as clearing agency to settle the exchange.

B. The processing of the Tribune and Lyondell transactions illustrates the complexity of the modern "indirect holding" system, by which publicly traded securities are deposited at DTC, acting as a clearing agency, and interests in the securities are held by tiers of stockbrokers and financial institutions (banks), acting as intermediaries on behalf of their retail and institutional customers, who may be intermediaries themselves or who may have the ultimate interests in the assets.

DTC is registered as a "clearing agency" by the Securities and Exchange Commission ("SEC") to facilitate the "prompt and accurate" processing of securities transactions on behalf of the major banks and broker-dealers that constitute its "Participants." *See* 15 U.S.C. §78q-1(b)(3). Participants deposit at DTC the underlying securities, which are registered in the name of DTC's nominee, Cede & Co. Cede thus becomes the record (legal) owner holding title to the deposited securities, which are held by DTC in "fungible bulk," meaning that each Participant has a pro rata interest in DTC's entire inventory for that issue, but no Participant has an ownership interest in any particular security on deposit. Self-Regulatory Organizations, Exchange Act Release No. 47,978, 2003 WL 21288541, at *7 (June 4, 2003) ("SEC Order"); Uniform Commercial Code ("UCC") §8-504(a); Depository Trust Co., *Rules, By-Laws, and Organization Certificate*, Rules 2(1), 3(1), 4(1) (July 2017). Securities on deposit at DTC are currently valued at approximately $37 trillion.

In depositing securities at DTC, Participants may be acting for their own account, or, as is typically the

case, acting for their customers. Transfers of ownership interests in publicly traded securities deposited at DTC are cleared at DTC's affiliate, the National Securities Clearing Corporation, and settled at DTC by means of automated book entry movements in Participants' DTC accounts. Participants, in turn, adjust the accounts of their respective customers to reflect the transactions, and the process is repeated through the tiers of ownership interests, until the account of the ultimate owner is reached. The indirect holding system is designed to dispense with the need to transfer or reissue physical shares, which facilitates a huge volume of transactions. *See* SEC Order, 2003 WL 21288541, at *6.

Ownership of securities held through the indirect holding system is governed by state law, in accordance with Article 8 of the UCC, which provides for a system of "security entitlements," i.e., "the rights and property interest of a person who holds securities or other financial assets through a securities intermediary." UCC §8-102(17); *see* UCC §8-115 cmt. 4; UCC §8-503 cmt. 2. Individual investors have securities entitlements against their banks or brokers, which may be DTC Participants or may have deposited the securities with DTC Participants, in which case the bank or broker would have a securities entitlement against the Participant. The Participants would then have securities entitlements against DTC. Significantly, DTC does not know whether its Participants are acting for themselves or customers, or the identity of the ultimate owners. In many instances, as in *Tribune* and *Lyondell*, there may be several tiers of securities intermediaries between DTC and the ultimate owners. At each tier, the enti-

tlement holder has only a securities entitlement against its securities intermediary.[3]

Parties at various steps of the process may hold their interests in various ways. A bank may hold shares for its customers, *In re Resorts Int'l, Inc.*, 181 F.3d 505, 508-509 (3d Cir. 1999); *Enron Creds. Recovery Corp.* v. *Alfa, S.A.B. de C.V.*, 651 F.3d 329, 331 (2d Cir. 2011); a mutual fund may hold shares, and its investors may hold shares in the fund, *Jones* v. *Harris Assocs. L.P.*, 559 U.S. 335, 338 (2010); a broker may be the record holder of shares for a retiree's 401(k) retirement account, *In re Kaiser Steel Corp.*, 952 F.2d 1230, 1237-1238, 1240 n.11 (10th Cir. 1991); a retiree's interest may be part of an employer-sponsored retirement program under ERISA, 28 U.S.C. §1002(34), (35); or a trustee may hold shares for beneficiaries under a trust document and the common law, *Restatement (Third) of Trusts* §§70-89 (2007). These variations, and more, are represented among the thousands of defendants in *Tribune* and *Lyondell*.

Unwinding any securities transfer through long chains of securities entitlements could require undoing or cancelling various transaction segments, affecting

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[3] "[T]he securities intermediary's customer typically is the *beneficial* owner," with the last such owner in the chain "sometimes referred to as the *ultimate beneficial* owner." SEC, *Issuer Restrictions or Prohibitions on Ownership by Securities Intermediaries*, 69 Fed. Reg. 70,852, 70,853 & n.21 (Dec. 7, 2004) (emphasis added). If the sort of "beneficial" interest held by intermediaries in the indirect holding system satisfies the Seventh Circuit's conception of a "beneficial interest," then even if the judgment is affirmed, the Tribune and Lyondell transfers—and most contemporary securities transactions—will be safe harbored under §546(e). For purposes of this brief, however, Amici assume the court equated beneficial interests with the *ultimate* interest in the property.

numerous parties. At any point in a chain, an institution might have gone out of business or might be exposed to risk if a customer on whose behalf it acted was unable to satisfy a claim. And even if a bankruptcy trustee could avoid a transfer only as to the ultimate owner, without disrupting any other part of the transaction, that alone would create uncertainty and risk in the capital markets and thus raise the cost of capital. *See Tribune*, 818 F.3d at 121 ("A lack of protection against the unwinding of securities transactions would create substantial deterrents ... to investing in the securities market.").

The Seventh Circuit's belief that its reading of §546(e) would not cause a "ripple effect through the financial markets," Pet. App. 15, can be understood only in light of its narrow focus on the facts before it—a relatively small transaction involving a privately held company with only a few shareholders. That transaction did not touch the indirect holding system for public securities, and the Seventh Circuit declined to examine the broader impact of its decision. *Id.* 15-16 ("Nor are we persuaded that the repercussions of undoing *a deal like this one* outweigh the necessity of the Bankruptcy Code's protections for creditors." (emphasis added)). But Congress's use of words like "securities clearing agency" in §546(e) shows that public securities transactions consummated through the indirect holding system, like those in *Tribune* and *Lyondell*, were at the heart of Congress's concern in enacting the safe harbor. *See* H.R. Rep. No. 97-420, at 1 (1982) (noting that "commodities and securities markets operate through a complex system of accounts and guarantees," and explaining that safe harbor was needed for transactions in these markets "[b]ecause of the structure of the clearing systems in these industries"). The Seventh Cir-

cuit's narrow interpretation threatens large public transactions like these, which Congress unquestionably sought to protect.

II. The Bankruptcy Code's Text And Structure Make Clear That Section 546(e)'s Safe Harbor Applies Where A Qualifying Entity Acts Only As An Intermediary

As the Tribune and Lyondell transactions show, there is a compelling need to protect from avoidance securities-settlement payments where the payment is made by or to a Qualifying Entity, even if that entity acted only as an intermediary. That is exactly what Congress did in §546(e).

A. The Text Of Section 546(e) Demonstrates That The Safe Harbor Applies Where The Qualifying Entity Is Only An Intermediary

1. By its terms, §546(e) requires only that the "transfer [be] made by or to (or for the benefit of)" a Qualifying Entity. A transfer of cash or other property can obviously be made "by" or "to" someone without that person having or obtaining a beneficial interest in the transferred property. Last Term, the Court observed: "As a matter of ordinary English, the word 'obtained' can (and often does) refer to taking possession of a piece of property without also taking ownership." *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017). So, too, with "by" and "to." For example, when a prospective homebuyer informs the seller that it has transferred the purchase-money funds "to" an escrow agent to hold pending closing, no one would understand the buyer to mean the escrow agent has obtained a beneficial (or ultimate) interest in the funds, just as no one would think the subsequent dis-

bursement "by" the escrow agent to the seller means the agent was, until then, the beneficial owner of those proceeds. On its face, therefore, §546(e) includes a transfer "by" or "to" a securities clearing agency, stockbroker or other Qualifying Entity, even when it acted "only" as an intermediary in the securities settlement process.

The court below nonetheless found the phrase "made by or to" ambiguous because, in its view, "a transfer through a financial institution as intermediary could reasonably be interpreted as being 'made by or to' the financial institution or 'made by or to' the entity ultimately receiving the money." Pet. App. 5. Both interpretations may be reasonable. The court of appeals went awry in assuming that one had to be right *to the exclusion of the other*. Nothing in the statutory text supports that assumption. One says naturally that, as happened in the Tribune and Lyondell transactions, a payment by a company of billions of dollars for its stock to a financial intermediary, with the expectation that the intermediary will distribute the appropriate amounts to each shareholder when that shareholder returns its shares or completes the necessary paperwork, is a transfer *both* "to" the intermediary *and* "to" the ultimate shareholder. The court of appeals' approach improperly injects a requirement—exclusivity—that is absent from the statute.

2. The phrase "or for the benefit of" reinforces this conclusion. The court below thought it "could refer to a transaction made *on behalf of* another [qualifying] entity," in which case "the whole phrase refers only to named entities receiving a financial interest—whether or not that entity received the actual transfer of property." Pet. App. 6. But, by focusing exclusively on this one phrase among a list of three alternatives, the court

inserted a requirement—that the Qualifying Entity have a beneficial interest—that contradicts the text. That the phrase "for the benefit of" is introduced by "or" shows it is an *alternative* way for a transaction to qualify and that the preceding phrase "by or to" *does not* include such a requirement. By listing three possibilities separated by "or," Congress made clear that the safe harbor protects transfers made "by" or "to" a Qualifying Entity, even when the transfer is not also "for [that entity's] benefit."

The simple reading that respects, and does not alter, the text is precisely the one so many other lower courts have adopted: the safe harbor applies if the transfer is *by* a Qualifying Entity (regardless whether it has a beneficial interest), *to* a Qualifying Entity (regardless whether it has a beneficial interest), *or* by or to a *non*-Qualifying Entity but "for the benefit of" a Qualifying Entity. *See In re Quebecor World (USA) Inc.*, 719 F.3d 94, 99-100 (2d Cir. 2013); *In re QSI Holdings, Inc.*, 571 F.3d 545, 551 (6th Cir. 2009); *Contemporary Indus. Corp.* v. *Frost*, 564 F.3d 981, 986-987 (8th Cir. 2009); *In re Resorts Int'l, Inc.*, 181 F.3d at 516; *Kaiser Steel Corp.* v. *Charles Schwab & Co.*, 913 F.2d 846, 849 (10th Cir. 1990).

That reading is confirmed by the background against which Congress added the phrase "or for the benefit of" to §546(e). *See* Financial Netting Improvements Act of 2006, Pub. L. No. 109-390, §5(b)(1), 120 Stat. 2692, 2697. Before the amendment, most Circuits to address the question had recognized that the phrase "made by or to" included transfers where the Qualifying Entity acted as an intermediary, consistent with the interpretation urged by the SEC. *In re Resorts Int'l*, 181 F.3d at 515-516; *Kaiser Steel Corp.*, 913 F.2d at 848, 850; *In re Kaiser Steel Corp.*, 952 F.2d at 1236;

SEC Br. 11, *In re Kaiser Steel Corp.*, 952 F.2d 1230 (10th Cir. 1991) (Nos. 90-1243, -1245) ("SEC *Kaiser* Br."). Only a divided panel of the Eleventh Circuit had held otherwise, reading §546(e) to require that the transfer be "made" *both* "by or to" *and* for the benefit of a Qualifying Entity. *In re Munford, Inc.*, 98 F.3d 604, 610 (11th Cir. 1996) (per curiam). The SEC disagreed with the Eleventh Circuit. *See* SEC Br. in Opp'n 5-6, *DFA Investment Dimensions Group, Inc.* v. *Munford, Inc.*, Nos. 97-550, -591 (U.S. Nov. 1997) ("SEC *Munford* Br."). In light of that history, Congress's insertion of the phrase "*or* for the benefit of" was a repudiation of *Munford*, clarifying that a Qualifying Entity's beneficial interest is a separate, sufficient basis for safe harbor, rather than a necessary (but insufficient) requirement.

3. This case illustrates how the Seventh Circuit's interpretation errs. The debtor's lender, Credit Suisse, transferred $55 million to Citizens Bank, which held the funds as escrow agent, for their ultimate payment to the debtor's shareholders. Upon the closing, Citizens Bank transferred part of the purchase price to one of those shareholders, Merit, in exchange for its stock. Three years later, Citizens Bank transferred to Merit the balance of the purchase price, which Citizens Bank had escrowed to reserve against indemnity claims by the debtor. Pet. App. 20-21; ECF 60-1, 60-11, 60-12, *FTI Consulting* v. *Merit Mgmt.*, No. 11-07670 (N.D. Ill. Nov. 5, 2014). Under the plain terms of §546(e), there was a transfer of cash (in which the debtor had an interest, as the borrower) "by" Credit Suisse "to" Citizens Bank, both financial institutions, and then two subsequent transfers—one occurring three years later—"by" Citizens Bank to Merit.

The error in the Seventh Circuit's approach is even starker in the context of a large transaction in publicly traded securities, like those in which amici were involved. In the Lyondell transaction, Citibank played a central role in facilitating the exchange of money and stock: Lyondell "deposit[ed]" $12.5 billion with Citibank; Citibank "receive[d] ... Shares ... surrendered for payment of [that] cash"; and Citibank "pa[id the] cash for [those] shares." Paying Agent Agreement ¶¶ 1(e), 3 (Decl. Firsenbaum, Ex. B, *In re Lyondell Chemical Co.*, Adv. Pro. 10-04609 (ECF 73) (Bankr. S.D.N.Y. Jan. 11, 2011)). That exchange yielded payments to the shareholders, which (as alleged in the *Lyondell* complaints) included dozens of banks and brokers that were registered holders of Lyondell shares and that, in turn, transferred payments to their respective customers that were the ultimate owners. *See* Complaint ¶¶ 15-194 (*In re Lyondell Chemical Co.*, Adv. Pro. 10-04609 (ECF 1-3, Ex. A) (Bankr. S.D.N.Y. Dec. 1, 2010). Likewise, the Tribune buyout involved payments to thousands of Tribune shareholders that were processed through CTC and cleared and settled through DTC. *See supra* Part I.A. Yet, even though these transactions involved transfers of billions of dollars "to" and "by" financial institutions, stockbrokers, and securities clearing agencies, the Seventh Circuit's reading would seemingly deny safe-harbor protection because the funds were not transferred for those Qualifying Entities' ultimate benefit.

4. That reading raises an additional textual difficulty. A single "transfer" could be *partially* voidable, something the statute does not allow. Under the Seventh Circuit's ruling, a trustee could avoid the transfer to the extent, but only to the extent, the ultimate owners were not Qualifying Entities. But §546(e) provides

that the trustee "may not avoid *a transfer*" to a Qualifying Entity. It does not contemplate that "a transfer" may be safe-harbored in part and avoided in part. Respondent's only possible response is to contend that in cases like *Tribune* and *Lyondell* there were thousands of transfers by the debtors, one to each ultimate owner, and each of those can be avoided if, but only if, the ultimate shareholder was not a Qualifying Entity under §546(e). But that ignores what actually happened: Tribune and Lyondell (really, their lenders on their behalves) each made just one or two wire transfers to CTC and Citibank, respectively, of the full proceeds to re-acquire all their shareholders' stock.

B. The Structure Of Section 546(e) Demonstrates That The Safe Harbor Applies Where The Qualifying Entity Is An Intermediary

1. The Qualifying Entities function principally—or *exclusively*—as financial intermediaries in securities (or commodities) transactions, not as beneficial owners. It therefore would have made no sense for Congress to limit §546(e) to transactions where the Qualifying Entity has a beneficial interest. Rather, by including entities in §546(e) that always or at least often function as intermediaries, Congress must have intended to protect from avoidance transfers made through such entities to the myriad types of shareholders that are not themselves Qualifying Entities.

The Qualifying Entities "are typically facilitators of, rather than participants with a beneficial interest in, the underlying transfers." *Quebecor*, 719 F.3d at 100. A "securities clearing agency," for example, "acts as an intermediary in making payments or deliveries or both in connection with transactions in securities," or "acts as a custodian of securities in connection with a system

for the central handling of securities." 15 U.S.C. §78c(23)(A); *see* 11 U.S.C. §101(48) (incorporating §17A of the Securities Exchange Act of 1934); *see also* 15 U.S.C. §78q-1(b)(3)(A), (F) (responsibilities of registered clearing agents).

"Commodity broker" and "financial participant" likewise include a "clearing organization." 11 U.S.C. §101(6), 101(22A)(B); *see id.* §761(2). And "stockbroker" includes a person who "effect[s] transactions in securities ... *for the account of others*." *Id.* §101(53A) (emphasis added); *see also id.* §741(2) (defining "customer"). Similarly, "financial institution" includes banks and trust companies "acting as agent or custodian for a customer ... in connection with a securities contract." *Id.* §101(22)(A).

As these terms make clear, many of the entities named in §546(e) act primarily, if not exclusively, as intermediaries in settling securities transactions, rather than as beneficial owners trading for their own account. Congress's decision to tie §546(e) to such institutions can only be understood, therefore, as intended to safe harbor settled securities transactions that were facilitated by Qualifying Entities acting *as intermediaries*.

2. The Code defines "transfer"—the action expressly exempted from avoidance by §546(e)—to include a far broader range of actions than the conveyance of the ultimate, or beneficial, interest. "Transfer" includes "the creation of a lien," "the retention of title as a security interest," and "each mode ..., absolute or conditional, ..., of disposing of or parting with (i) property[] or (ii) *an interest* in property." 11 U.S.C. §101(54)(A)-(B) & (D) (emphasis added). Congress intended the term "transfer" to be "as broad as possible," and recognized that "possession, custody, and control

are interests in property." S. Rep. No. 95-989, at 27 (1978); H.R. Rep. No. 95-595, at 314 (1977). For example, when a debtor grants a lien in its property to a secured creditor, the creditor obtains only a security interest in the property, not beneficial ownership. And a securities clearing agency or stockbroker may obtain a legal interest in—or even take record title to—a security (or cash paid for that security) to facilitate a transaction, *without* acquiring any beneficial interest. *See, e.g., Kaiser Steel*, 952 F.2d at 1237-1238 (describing "street-side settlement" and "customer-side settlement"); *supra* Part I.B (discussing holding system as chain of "securities entitlements").

3. Section 546(e) does not require that the Qualifying Entity be a "transferee" of the transferred property, a term used in §550 that has been construed to exclude intermediaries. The omission of the term "transferee" from §546(e) confirms that Congress did not intend to limit the safe harbor to Qualifying Entities that are "transferees" under §550 with a beneficial interest, but rather intended §546(e) to safe harbor any settlement payment "by" or "to" a Qualifying Entity regardless whether that entity had the ultimate interest.

The difference in the statutory language in the two sections is telling. Section 550 identifies the parties that are liable when the trustee avoids a transfer under one of the Code's avoidance provisions (e.g., §§547 and 548, governing avoidance of preferential and fraudulent transfers). It provides that the trustee may recover the transferred property (or its value) from a "transferee." 11 U.S.C. §550(a). Many lower courts have held that a recipient of a transfer that acts as an intermediary is *not* a "transferee." *See, e.g., Bonded Fin. Servs.* v. *European Am. Bank*, 838 F.2d 890, 893-894 (7th Cir. 1988); *In re Finley, Kumble, Wagner, Heine, Under-*

berg, Manley, Myerson & Casey, 130 F.3d 52, 56-59 (2d Cir. 1997). Rather, these courts have held that an entity is a "transferee" only if, because of the transfer, it obtains "dominion over the money or other asset," with "the right to put the money to one's own purposes." *Bonded*, 838 F.2d at 893; *Finley, Kumble*, 130 F.3d at 56-57.

But, unlike §550, the term "transferee" appears nowhere in §546(e). The Seventh Circuit below (like the Eleventh Circuit before it) thus disregarded the actual words of the statute when it concluded that §546(e) was co-extensive with §550 and safe harbors a securities transfer only when the Qualifying Entity was the "transferee." *See* Pet. App. **12-13**; *Munford*, 98 F.3d at 610. To the contrary, Congress's choice not to limit §546(e)'s scope to "transferees," as it did in §550, shows that it intended no such limitation. *See Henson*, 137 S. Ct. at 1723 (this Court "presume[s] that differences in language like this convey differences in meaning"); *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Congress had good reason to extend the safe harbor to situations where Qualifying Entities act as intermediaries, even if Congress's only purpose in enacting §546(e) were to protect Qualifying Entities from liability, as the Seventh Circuit incorrectly supposed (*see* Pet. App. 2), rather than also to protect the broader financial markets in which they participate (*see infra* Part III.A-C). Although many courts have held that an intermediary is not a "transferee" liable under §550, the statute does not define the term "transferee" and hence

this interpretation is a judicially created body of law with uncertain application.[4]

The very case that spurred the enactment of §546(e) illustrates the point. In *Seligson* v. *New York Produce Exch.*, 394 F. Supp. 125 (S.D.N.Y. 1975), a bankruptcy trustee brought a fraudulent-transfer suit against a clearing agency to recover margin payments that a commodities broker had made to the clearing agency before the broker filed for bankruptcy. *Id.* at 127. The clearing agency argued that it was a "mere 'conduit'" (because it had distributed the margin payments as profits to the parties on the opposite side of the trade from the broker), but the court denied it summary judgment, finding that the relationship between the clearing agency and its members raised a genuine issue as to whether the agency was a "transferee." *Id.* at 126-127, 134-136.

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[4] *See, e.g., In re AgriProcessors, Inc.*, 859 F.3d 599, 604-606 (8th Cir. 2017) (bank was *intermediary* as to customer's deposits covering intra-day overdrafts but *transferee* as to deposits covering permanent overdrafts); *compare, e.g., In re Kaiser Steel Corp.*, 110 B.R. 514, 520-521 (D. Colo. 1990) (stockbroker was *intermediary*; lien rights against customer's settlement payments were insufficient dominion to be transferee), *aff'd*, 913 F.2d 846 (10th Cir. 1990), *with In re Manhattan Investment Fund Ltd.*, 397 B.R. 1, 17-21 (S.D.N.Y. 2007) (stockbroker was *transferee*; lien rights against customer's margin payments was sufficient dominion); *compare also, e.g., Bonded*, 838 F.2d at 893-894 (dominion requires unfettered right to "invest in lottery tickets or uranium stocks"), *with In re Incomnet, Inc.*, 463 F.3d 1064, 1075 (9th Cir. 2006) (dominion established by limited discretion though transferee "cannot invest funds in ... 'lottery tickets or uranium stocks'"); *cf. In re Harbour*, 845 F.2d 1254, 1257-1258 (4th Cir. 1988) ("conduit" was "transferee" under §550); *In re Southern Indep. Banking Corp.*, 126 B.R. 294, 299-300 (E.D. Tenn. 1991) (escrow agent was "transferee" under §550 "though it was merely a conduit").

Congress sought to "overrule[] *Seligson*." S. Rep. No. 95-989, at 106; *see* Pub. L. No. 95-598, §764(c), 92 Stat. 2549 (1978) (safe harboring commodities markets); H.R. Rep. No. 95-595, at 269-271, 392; Pub. L. No. 97-222, sec. 4, §546(d), 96 Stat. 235, 236 (1982) (extending safe harbor to securities markets). It did so by providing in §546(e) a broad safe harbor that applies whenever a securities payment is made "by" or "to" a Qualifying Entity, whether that entity was a "transferee" or merely an intermediary.

The 2006 amendment of §546(e) further confirms the point. By then, many courts had held that "transferee" excluded intermediaries. *See* 5 *Collier on Bankruptcy* ¶ 550.02[4][a] (16th ed.). And the Eleventh Circuit—splitting with the other circuits to reach the question—had construed §546(e) to apply only when the Qualifying Entity was a "transferee" under §550. Congress could have sided with the Eleventh Circuit by narrowing §546(e) to apply only when the Qualifying Entity was the transferee. Instead, Congress did the opposite—it *broadened* §546(e) to clarify that the safe harbor applies if the transfer was by, to, "*or*" for the benefit of a Qualifying Entity.

Congress did so because, as is evident from §546(e)'s text and structure, Congress sought to enact broader market protections than the Seventh Circuit credited. If Congress's only purpose had been to protect Qualifying Entities from potential *liability*, it would have done something much simpler and narrower than enact §546(e). It would have amended the *liability* provision of the Code, §550, to bar a trustee from recovering an avoided transfer from a Qualifying Entity. Had it done that, it would have achieved the precise result that the Seventh Circuit's decision below suggests: in situations like those presented in *Tribune* and

Lyondell, the trustee could seek to avoid and recover settlement payments from ultimate shareholders that were not themselves Qualifying Entities, but not from those that were.

Instead, Congress enacted a broad safe harbor that prohibits any securities-settlement payment made "by" or "to" or "for the benefit of" a Qualifying Entity from being *avoided* at all. Section 546(e) thus ensures that the settlement payment cannot be recovered from anyone, including any ultimate shareholder, regardless whether that shareholder was itself a Qualifying Entity.

4. Notably, the Seventh Circuit's analysis focuses almost exclusively on the characteristics of the ultimate *recipient* and effectively ignores that §546(e) also bars avoidance of any transfer made "*by*" a Qualifying Entity, even if the transfer is not made "to" such an entity. That Congress made the safe harbor applicable where the transfer was merely "by," and not "to," a Qualified Entity demonstrates that it intended the safe harbor to protect the securities markets and securities transactions, and not merely to free Qualifying Entities from potential liability. That is so because §550 imposes liability only on the "transfer*ee*" of an avoidable transfer, not on the transfer*or*. 11 U.S.C. §550. Barring avoidance of transfers made *by* Qualifying Entities thus has nothing to do with protecting such entities from liability. But it has everything to do with protecting the securities markets from the destabilizing effects of avoiding securities transactions.

5. The Seventh Circuit's attempts to interpret §546(e) by reference to other Code provisions also do not withstand scrutiny. The court pointed to §555, which permits Qualifying Entities to exercise termina-

tion rights under any securities contracts. Pet. App. 11-12. But nothing in §546(e) purports to limit its safe harbor to transfers where the Qualifying Entity is a party to a securities contract, much less to circumstances where such an entity has the ultimate interest in the transfer. Stockbrokers and other Qualifying Entities often contract to buy or sell securities on behalf of their customers, without having a beneficial interest in the transaction. *See, e.g., Kaiser Steel*, 952 F.2d at 1237-1238.

The court below also pointed to §548(c) and §548(d)(2), which provide a defense to avoidance to the extent the Qualifying Entity received a margin or settlement payment and acted in good faith. Pet. App. 10-11. The Seventh Circuit reasoned that reading §546(e) to apply where the Qualifying Entity is an intermediary would "be so broad as to render any transfer non-avoidable," and "that conflicts with section 548(c)'s good faith exception." *Id.* There is neither conflict nor surplusage. Section 546(e) does not protect any fraudulent transfer that is avoidable as an intentional fraudulent transfer under §548(a)(1)(A). But, in such a case, the defendant can assert good faith under §548(c). *See* 11 U.S.C. §548(c), (d)(2). Moreover, §546(e) applies only to certain securities- and commodities-related transfers, whereas §548(c)'s good-faith exception applies to all transfers.

The court below further noted that §548(a)(2) provides a safe harbor against avoidance of charitable contributions "to" qualified religious or charitable organizations. Pet. App. 11. It reasoned that the "'to' language in section 548(a)(2) should be read consistently with section 546(e), because ... otherwise ... charitable contributions made ... through a bank would be avoidable." *Id.* But reading §546(e) to apply where the Quali-

fying Entity is an intermediary does not lead to that result; reading §§546(e) and 548(a)(2) consistently would protect both settlement payments and charitable contributions made through such intermediaries.

Finally, the Seventh Circuit noted that §547 permits the trustee to avoid preferential transfers to creditors. Pet. App. 8. But nothing in §547 requires that a Qualifying Entity specified in §546(e) also be a creditor. As this case, *Tribune*, and *Lyondell* illustrate, fraudulent-transfer claims are frequently brought where the debtor makes transfers in securities transactions to intermediaries that are not creditors.

III. The Seventh Circuit's Narrow Reading Of §546(e) Threatens The Stability Of Securities Markets And Discourages Investment

Because the text and structure of §546(e) are clear, the Court need go no further. But, to the extent relevant, the objectives of §546(e) confirm the plain reading of the statutory text.

A. Congress's Purpose In Enacting §546(e) Was Not Only To Protect Qualifying Entities From Liability, But Also To Protect Settlement Finality And Market Stability

As discussed (*supra* Part II.B.3), Congress reacted to the *Seligson* decision not by crafting §550 to limit recovery against Qualifying Entities, but by enacting §546(e) to preclude altogether the avoidance of complex securities transactions involving clearing agencies, stockbrokers and other financial intermediaries. Congress established this safe harbor to "minimize the displacement" that a major bankruptcy might cause "in the commodities and securities markets." H.R. Rep.

No. 97-420, at 1; *Kaiser Steel*, 913 F.2d at 848 (noting "legislative intent behind § 546 to protect the nation's financial markets from the instability caused by the reversal of settled securities transactions"). Congress sought to "[e]nsure the stability of the market," H.R. Rep. No. 97-420, at 2, and to "promot[e] finality[,] ... 'speed and certainty in resolving complex financial transactions'." *Kaiser Steel*, 952 F.2d at 1240 n.10 (quoting H.R. Rep. No. 101-484, at 2 (1990)).

Preventing avoidance of transfers in which Qualifying Entities function as intermediaries furthers §546(e)'s purposes because it is precisely when those entities so function that clearing agencies, brokers, financial institutions, and other Qualifying Entities provide the essential market stability and finality that Congress sought to protect. *See Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 94th Cong., Supp. App. pt. 4, at 2377-2384 (1976) (CFTC Chairman testifying that clearing agencies enhance market stability as intermediaries); 15 U.S.C. §78q-1(b)(3)(A), (F) (clearing agency responsible for "facilitat[ing] the prompt and accurate clearance and settlement of securities transactions," and "protect[ing] investors and the public interest").

As the Second Circuit has observed, "[u]nwinding settled securities transactions" made through such intermediaries "would seriously undermine ... markets in which certainty, speed, finality, and stability are necessary to attract capital." *Tribune*, 818 F.3d at 119. "The method of settlement through intermediaries is essential to securities markets. Payments by and to such intermediaries *provide certainty as to each transaction's consummation*, speed to allow parties to adjust the transaction to market conditions, finality with regard to

investors' stakes in firms, and thus stability to financial markets." *Id.* (citing H.R. Rep. No. 97-420; H.R. Rep. No. 95-595) (emphasis added). A "clear safe harbor for transactions made through these financial intermediaries promotes stability in their respective markets." *Quebecor*, 719 F.3d at 100 ("transaction[s] involving one of these financial intermediaries, even as a conduit, necessarily touches upon these at-risk markets").

The SEC has consistently stressed these points over the past two decades. Expressly disagreeing with the first appellate decision that restricted §546(e) to the relatively rare circumstance when a Qualifying Entity is the ultimate owner, the SEC explained that Congress enacted §546(e) "to protect entities that act as 'conduits' between buyers and sellers in clearing and settling millions of securities transactions every year, as well as the buyers and sellers themselves, from the uncertainty and disruption in the securities markets that could otherwise be caused by the risk or actuality of bankruptcies affecting market participants." SEC *Munford* Br. 5-6. The SEC continued: "Holding Section 546(e) inapplicable to payments made by or to brokers, clearing agencies, or financial institutions whenever they could be characterized as acting as 'conduits,' rather than as principals, would largely nullify the statute." *Id.* The SEC has repeated that view in subsequent cases. Most recently, in *Tribune* the SEC noted that allowing settlement payments to "individual shareholders" to be avoided and recovered would undermine market stability by "creat[ing] an environment hostile to capital formation." SEC Br. 1-2, 13-14, *In re*

Tribune Co. Fraudulent Conveyance Litig., No. 13-3992 (2d Cir. Mar. 6, 2014), ECF No. 161.[5]

In short, the broad reading of §546(e) that most Circuits have adopted follows not only from its text, but also from Congress's unqualified statement that the safe harbor "expressly extend[s] ... protections to the securities market." H.R. Rep. No. 97-420, at 375.

B. The Seventh Circuit's Narrow Construction Of §546(e) Would Destabilize Securities Markets By Unwinding Long-Settled, Complicated Transactions And Creating Arbitrary Distinctions Among Market Participants

As Congress and the SEC have recognized, permitting plaintiffs to unwind multi-billion-dollar transactions, involving transfers between thousands of different market participants a decade earlier, would inject substantial uncertainty and increased exposure into a system that demands certainty and finality.

1. Recovery from the ultimate owner at the end of a potentially long chain of intermediaries could require litigation regarding a string of transfers that occurred years earlier. As a plaintiff sued each owner in the chain, each defendant would try to avoid liability by pointing to another, including possibly a Qualifying Entity, as the supposed true beneficial owner. Litigation would ensue as to whether one or another party had sufficient "dominion" over the proceeds to be a "transferee" from whom the avoided transfer could be recovered under §550.

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[5] *See also, e.g.*, SEC Br. 1-2, 17-21, *Enron Creditors Recovery Corp.* v. *Alfa, S.A.B. de C.V.*, No. 09-5122 (2d Cir. Aug. 23, 2010); SEC *Munford* Br. 3 (noting previous filings at panel and *en banc* stages before Eleventh Circuit); SEC *Kaiser* Br. 10-19.

The Seventh Circuit's standard is not the one underlying modern statutes governing the securities holding system. Rather, as discussed above (*supra* Part I.B), parties generally have "securities entitlements" against the next party in the chain, which gives the exclusive right to direct the next party to sell its interest and to receive payment in exchange. And modes of ownership can vary considerably. Thus, the question who has a sufficient "beneficial interest" to satisfy the Seventh Circuit's test can be quite fraught. In *Tribune*, for example, one defendant is Tribune's 401(k) plan, which had invested in Tribune stock on behalf of Tribune employees. That 401(k) plan is a legal entity, but whether it or each of its thousands of employee participants is the "beneficial owner" of shares could be critically important, especially if participants have withdrawn their funds. The 401(k) plan and its beneficiaries would be turned against one another. Similar questions would arise in other relationships, especially if one party were a Qualifying Entity, such as if the trustee of a common testamentary trust that owned the shares were a financial institution or a customer thereof.

In a large public-company transaction, the process would be particularly disruptive. Many investors would no longer be clients of the intermediary they used for the unwound transaction. At a minimum, the avoidance claims would generate protracted and costly litigation as parties in the chain attempted to pass the buck to (or prevent the buck from passing from) another actor in the chain. The massive exposure would result in bet-the-company litigation for many participants, leading creative lawyers to litigate over the true nature of ownership and to seek to insulate their clients from liability. That litigation alone would threaten to destabilize the market. The risk that different courts

would reach different conclusions as to which participants and forms of ownership are protected would only exacerbate the problem.

If successful, these claims could have ripple effects on other market participants. "If a firm is required to repay amounts received in settled securities transactions, it could have insufficient capital or liquidity to meet its current securities trading obligations, placing other market participants and the securities markets themselves at risk." *Enron Creditors Recovery Corp.*, 651 F.3d at 334.

2. Limiting §546(e)'s safe harbor would further destabilize the market by creating arbitrary distinctions. Under the Seventh Circuit's interpretation, certain institutional investors acting for their own account would be immune from avoidance actions, whereas other investors would not. Likewise, mutual funds registered under the Investment Company Act of 1940 would be protected, but investment companies exempt from that Act's registration requirements would not. *See* 11 U.S.C. §101(22)(B).

Whether individual investors would face exposure would similarly depend on the happenstance of how they held the investment. For example, individual shareholders would be protected if they held the shares as a customer of a commercial or savings bank, because the definition of "financial institution" includes not only banks themselves, but also their customer "when any such ... entity is acting as an agent or custodian for a customer." 11 U.S.C. §101(22)(A).

These arbitrary distinctions would create opportunities for arbitrage, allowing sophisticated investors to exploit price differences and shift cost and potential liability to the rest of the market. In the run-up to a

transaction with potential risk of future constructive fraudulent-transfer claims, unprotected investors would have to discount the value of the shares for the risk of those potential claims, while protected investors could buy the target shares without that risk, thus gaining a windfall. Those exposed would be the least sophisticated investors—often retirees or others who can least afford it (many of whom are defendants in *Tribune* and *Lyondell*). Such distinctions, disfavoring those least able to protect themselves, would undermine Congress's aim of enhancing market stability.

C. Eliminating The Section 546(e) Safe Harbor For Transfers Through Intermediaries Would Erode Investor Confidence, Discourage Public Investment, And Reduce Liquidity

Both Congress and the courts have recognized the importance of "promot[ing] investor confidence" in the integrity and efficiency of securities markets. *Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058, 1067 (2014) (noting that is the "basic purpose" of the federal securities laws). "The success of the U.S. securities markets is largely the result of a high level of investor confidence in the integrity and efficiency of our markets." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta*, 552 U.S. 148, 174 n.10 (2008) (quoting S. Rep. No. 104-98, at 8 (1995)).

Echoing this sentiment, Congress drafted §546(e) to foster investor confidence in the securities markets and promote capital formation. As the Second Circuit has observed, §546(e)'s broad language protects "transactions rather than firms ... in order to reduce the cost of capital to the American economy," and was "sought by the SEC ... to protect investors" from the unwinding of securities transactions. *Tribune*, 818 F.3d at 121-

122; *see also Peterson* v. *Somers Dublin Ltd.*, 729 F.3d 741, 748 (7th Cir. 2013) ("Congress enacted [§]546(e) to ensure that honest investors will not be liable" if a transaction renders a company insolvent).

The possibility that settled transactions could be unwound, and the funds clawed back, would lead to an increase in both the cost and volatility of transactions in the capital markets. If, for example, ERISA plans were liable to return proceeds of a transaction associated with participants who had already cashed out or otherwise exited the plans, they would need to retain reserves to cover potential liability and protect current participants, and that, in turn, would "suck money from capital markets." *See Tribune*, 818 F.3d at 119; *see also id.* at 121-122 (observing that a narrow view of the safe harbor would lead to a net "reduction of capital available to American securities markets" by exposing "all investors in public companies [to] new and substantial risks").

Concerns about fraudulent-conveyance liability could also reduce the liquidity of investments. Shares in Tribune and Lyondell were actively traded up to the closing of the transactions.[6] Shareholders needing immediate cash, or seeking to avoid a possible hitch in the closings, were able to eliminate their positions before the transactions closed in the companies through market sales. If potential buyers had believed they risked losing the entirety of their investment in the event the company later filed bankruptcy, they would naturally have been less willing to purchase the stock or would have offered a lower price.

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[6] *Historical Price Table for Tribune Co. 10/08/07 to 12/07/07*, Bloomberg LP; *Historical Price Table for Lyondell Chemical Co. 10/22/07 to 12/21/07*, Bloomberg LP.

Further, the threat of constructive fraudulent-conveyance claims would undermine investors' "reliance on the integrity of the market"—a factor this Court has deemed essential to our efficient market—and thereby inhibit capital formation. *See Basic Inc.* v. *Levinson*, 485 U.S. 224, 247 (1988). In many instances, a constructive fraudulent-conveyance action to avoid securities-settlement payments, in effect, would allege merely that the market mis-valued the company whose shares were involved. To permit a settled securities transaction to be unwound on nothing more than that would strike at the very heart of individual investors' ability to rely on the market. By contrast, in the rare instance that a securities transaction resulted from actual fraudulent intent, the market process has already been tainted, and the beneficiary of that fraudulent intent (even if unwitting) has a less powerful claim against upsetting settled expectations.

In light of these concerns, but also cognizant of the desire to protect creditors with unsatisfied claims, Congress made a policy judgment in §546(e): protect the finality of settled securities transactions and the stability of the securities markets from the disruption that would be caused by constructive fraudulent-transfer claims, which are easily alleged when the issuer becomes insolvent and files for bankruptcy, while preserving claims for creditors who are victims of intentional fraud. *See* 11 U.S.C. §546(e) (excluding from safe-harbor intentional fraudulent-transfer claims under §548(a)(1)(A)).

Tribune and *Lyondell* illustrate how this balance operates in practice. Even under the Second Circuit's broad interpretation of §546(e), requiring the dismissal of the constructive fraudulent-transfer claims in those cases, plaintiffs were able to pursue intentional fraudu-

lent-transfer claims, to the extent they could allege actual fraudulent intent. *See Tribune*, 818 F.3d at 112; *In re Lyondell Chem. Co.*, 554 B.R. 635, 646 (S.D.N.Y. 2016). Under the Seventh Circuit's ruling, a trustee would face the far lighter burden of pleading *constructive* fraudulent conveyance and could tie up investors for a decade or longer.[7]

Nothing in the text or structure of §546(e) compels the Court to construe it in a way that so seriously undermines Congress's purposes.

D. At A Minimum, The Court Should Reserve Decision On §546(e)'s Application To Transfers Involving Securities Settled Through The Public Company Clearing And Settlement System

If the Court affirms the Seventh Circuit's holding that §546(e) does not apply to the *Merit Management* transaction, it should reserve ruling on the question whether the safe harbor protects transactions that are cleared and settled through the national clearing system even where Qualifying Entities are not the ultimate (or beneficial) shareholders of the public company that was the subject of the transaction, as in *Tribune* and *Lyondell*.

The Tribune and Lyondell transactions lie at the heart of Congress's concern in enacting §546(e). In its original enactment, Congress focused on the involvement of securities clearing agencies and stockbrokers, which act largely or exclusively as financial intermedi-

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[7] *See, e.g.*, 11 U.S.C. §544 (allowing trustee to invoke state fraudulent-transfer law "reach-back" periods); *In re Frank Santora Equip. Corp.*, 256 B.R. 354, 372 (Bankr. E.D.N.Y. 2000) (six-year reach-back period under New York law).

aries in the transfer of publicly held shares in large companies. *See* 128 Cong. Rec. 15,980, 15,981 (1982) (highlighting that §546(e) "encompasses both stockbrokers and securities clearing agencies"); H.R. Rep. No. 97-420, at 3 (statement of Sen. Dole) (same); *In re Norstan Apparel Shops, Inc.*, 367 B.R. 68, 76 (Bankr. E.D.N.Y. 2007) (concluding that the safe harbor was designed to protect public company transactions). There can be little question that the statue as originally enacted protected transfers to those entities, and then by those entities to further participants in the securities markets, as occurred, for most shares, with the transfer to and then by DTC in the Tribune and Lyondell transactions. Two years after §546(e)'s enactment, Congress *broadened* the provision by adding to the list of Qualified Entities "financial institution[s]," which often play a similarly central role in settling massive public securities transactions, as CTC did in *Tribune* and Citibank did in *Lyondell*. *See* Pub. L. No. 98-353, § 461, 98 Stat. 333, 377 (1984).

Under the interpretative canon *noscitur a sociis*, the new category of Qualified Entities—"financial institution[s]"—should be interpreted consistently with "the company it keeps." *McDonnell* v. *United States*, 136 S. Ct. 2355, 2368-2369 (2016) (quotation marks omitted). Therefore, even if the Court concludes that the role played by Citizens Bank in this case is not sufficiently comparable to the roles played by DTC, stockbrokers, and other intermediaries in *Tribune* and *Lyondell* to warrant application of the safe harbor, the Court should clarify that it is not precluding application of the safe harbor to those transactions that sit at the center of Congress's concerns, as the Tribune and Lyondell transactions do.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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JULY 2017